IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Civil Suit No. 6 of 2000

Judgment reserved on 4.9.2006

Date of decision: 19.9.2006

M/s. Continental Construction Ltd. …….. Plaintiff / Claimant.

Versus

H.P. State Electricity Board …….. Defendant / Respondent

Coram

The Hon'ble Mr. Justice : **Surjit Singh, Judge.**

Whether approved for reporting?

For the plaintiff : **Mr. J.S. Bhogal, Sr. Advocate, with Mr. Suneet Goel, Advocate.**

For the defendant : **Mr. K.D. Sood, Advocate, with Mr. Sanjeev Sood, Advocate.**

Surjit Singh, Judge

On 10.5.1983 an agreement was executed between the plaintiff and the defendant, whereby work of construction of diversion weir, intake, desilting tank and storage reservoir of Sanjay Vidyut Pariyojna, Bhaba (120 MW) project was awarded to the plaintiff by the defendant for Rs.20,47,70,450/-. The work was agreed to be executed by 10.10.1985, subject to various terms and conditions, specified in the agreement. Clause-25 of the agreement provided for the settlement of disputes, arising

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Whether reporters of Local Papers may be allowed to see the Judgment?

between the parties in relation to the meaning and interpretation of the terms of the contract, specifications, designs, drawings and instructions and as to the quality of workmanship or material used in the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or other conditions or otherwise concerning the work or the execution or failure to execute the same, whether arising during the progress of the work or after the completion of the work or abandonment thereof or relating to termination of rescission or delay in the execution and all consequences thereof, was referred for arbitration to two Arbitrators - one to be engaged by the plaintiff (contractor) and the other by the H.P. State Electricity Board - and the two Arbitrators, so nominated, were to select an umpire by mutual agreement. Dispute arose between the parties, when certain claims, preferred by the plaintiff (contractor), were rejected by the defendant, vide communication dated 1.5.1989. The plaintiff, vide notice dated 2.8.1989, appointed one Dr. T.R.Seshadri as its Arbitrator. On receipt of the notice, the defendant appointed Shri A.K. Srikantiah as its Arbitrator. The Arbitrators, so appointed, entered upon arbitration in January, 1990. The parties submitted their claims to the Arbitrators.

2. Plaintiff submitted the following claims:-

(i) **<u>Claim-A</u>**

Payment of Rs.2,99,64,074.26 P. towards financial losses suffered due to failure of the defendant – Board in fulfilling their obligations as per terms and conditions of the contract, with interest at the rate of 18% per annum from 3.1.1988 till actual payment in respect of the following:

(a) Delay in receipt of construction drawings and day-to-day decisions from the defendant – Board;

(b) Delay in supply of adequate power and frequent power cuts thereafter;

(c) Delay in handing over the working area, that is, the reservoir floor and wall blocks area being used by M/s Gammon India Ltd., another agency working for the defendant – Board; and

(d) Extra unforeseen works involved in the reservoir floor, HRT – Intake junction structures, the design of which were finalized after October, 1985 before which the entire work was scheduled to be completed.

(ii) **Claim-B**

Payment of Rs.9,47,422.05 P. on account of the cost of two steel bridges provided and erected by the plaintiff – company for approach at the weir site, with interest at the rate of 18% per annum with effect from 1st July, 1987 till the date of payment.

(iii) **Claim-C**

Payment of Rs.41,00,370.40 P. for expenses incurred to bring granite stone from Jhansi, over and above the rates based on the local availability, with interest at the rate of 18% per annum with effect from 1st July, 1978 till actual date of payment.

(iv) **Claim-D**

Payment of Rs.58,20,291.40P. in respect of manufacturing and using crushed sand in the works instead of natural sand together with interest at the rate of 18% per annum with effect from 2.3.1988 till actual payment.

3. Defendant submitted the following counter claims:-

Claim-1

Amount due to the defendant – Board as a consequence of invocation of the penalty in accordance with clause-2 of the contract amounting to Rs.1,02,38,522.50P with interest at the rate of 18% per annum from 11.10.1985 till actual payment; and

Claim-2

Amount of Rs.12,53,08,000/- with interest at the rate of 18% per annum from 11.10.1985 till the date of actual payment on account of loss of net revenue, additional cost of establishment etc., for supervising the work, additional cost to the Board on account of escalation of prices and loss of interest on the blocked up capital.

4. The Arbitrators gave award on 1.6.1992. Plaintiff was awarded the following amounts on account of claims:-

Claim-A Rs.25,00,000/-‘

Claim-B Rs. 9,00,000/-

Claim-D Rs.30,00,000/-

5. The award amount was ordered to be paid within eight weeks, failing which interest at the rate of 18% per annum was ordered to be paid. Nothing was awarded to the defendant on account of its aforesaid counter claims.

6. Award was filed in the Court for being made the rule of the court. Plaintiff preferred no objection against the award, while defendant filed an objection petition, under Sections 30 and 33 of the Arbitration Act, 1940. It was alleged that, per clause-25 of the agreement, claims were required to be preferred within 90 days of the dispute being raised or within 90 days of the preparation of the final bill, whichever was earlier and in the present case the claims having not been preferred within 90 days of the arising of the dispute, the same were barred by time. It was also alleged that the award was contrary to the terms of the agreement. The Arbitrators were alleged to have mis-conducted themselves and the proceedings by allowing the claims, which had become time barred and also on counts in respect of which the agreement specifically provided that no claim would lie. It was also alleged that the Arbitrators had not given any reasons in support of the award, though the arbitration clause specifically provided for the

recording of reasons in support of the award. The rejection of the counter claims of the defendant were also objected to.

7. This Court framed the following issues:-

1. Whether the Arbitrator has mis-conducted himself and the proceedings? OP. Defd. Objector.
2. Relief.

8. Parties led their evidence on affidavits. Thereafter the matter was heard and vide order dated 10.4.1996 the award was remitted to the Arbitrators for re-consideration and giving reasons in support of the conclusions stated in the award, after affording an opportunity of being heard to the parties.

9. The Arbitrators, in compliance with the aforesaid order of this Court, have submitted their decision, in which reasons in support of the conclusions arrived at in the award dated 1.6.1992 are given.

10. Defendant has filed another objection petition in which it is stated that the reasons are illusionary and not real ones. It is alleged that the award in respect of some of the items is beyond the scope of contract / agreement. It is also stated that no valid and lawful reasons have been given by the Arbitrators as regards the objection of the defendant that the claims of the plaintiff were barred by time. Further it is stated that no reasons for dismissal of the counter-claim of the defendant are stated.

11. Following issues were framed by this Court on 13.7.2000:-

1. Whether the Arbitrators have failed to assign reasons for the award, as alleged? OPO
2. Whether the award or any part thereof is contrary to the express provisions of contract, as alleged? If so, to what effect? OPO
3. Whether the reasons given by the Arbitrators in support of their conclusions are perverse, as alleged? If so, to what effect? OPO
4. Whether the award or any part of it is beyond the jurisdiction of the Arbitrators, as alleged? OPO

5. Relief.

12. Under the orders of the Court, parties have adduced evidence on affidavits. In the affidavit of the concerned functionary of the defendant it is stated that the affidavit, filed earlier by his predecessor, by way of evidence in Civil Suit No. 102 of 1992, may be read as evidence.

13. In September, 2001 when the matter was listed for final hearing, an application was moved by the plaintiff- objector, seeking the leave of the court to amend the objections. In the application, it is stated that when the matter was being heard on 7.8.2001, it transpired that the arbitration clause in the agreement was similar to the clause which was the subject matter of consideration before the Hon'ble Supreme Court in **Rani Construction Company vs. H.P. State Electricity Board,** which had been decided alongwith **Thyssen Stahlumion GMBH vs. Steel Authority of India Ltd. [AIR 1999 SC 3923],** and therefore, the objections were required to be filed, under Section 34 of the Arbitration and Conciliation Act, 1996 and not under the old Act of 1940. Therefore, leave of the court has been sought for amending the objection petition, under Sections 30 and 33 of the Arbitration Act, 1940 already filed by the plaintiff. Prayer is made that the said objections may be treated as ones, under Section 34 of the Arbitration and Conciliation Act, 1996 and the plaintiff be permitted to add two more objections to the objections already filed. The objections sought to be added are as follows:-

> xv) That the award is against the public policy of India inasmuch as the Arbitration agreement provided that the Arbitrator was to give reasons for his award and this Hon'ble Court has also remitted the award for recording reasons vide its judgement dated 10.4.1996, still the Arbitrators have failed to record reasons and therefore the same is liable to be set aside.

xvi) That the award is otherwise also in conflict with the public policy of India and the law declared by the Supreme Court which is binding on the Arbitrator in awarding Rs. 12 lacs, Rs. 13 lacs, Rs. 9 lacs and Rs. 30 lacs in respect of claim (A) (issue 1.5, 1.6) and claim (B) (issue 2.4) and Claim (D) (issue 4.3 to 4.6), when the arbitration agreement prohibited the payment of the amount to the contractor and no reasons for or basis for awarding the said amounts have still been given in supplementary award dated 10.1.2000.

14. Prayer is opposed by the defendants mainly on the ground that the same is belated and the objections which are now sought to be added are time barred.

15. I have heard the learned counsel for the parties. Neither of the two grounds raised by the defendants for opposing the prayer for amendment of the objections has any merit. The award as given by the Arbitrators in the year 1992, was filed in the court for being made rule of the Court. Objections were raised by the present plaintiff soon after the filing of award. The Arbitration and Conciliation Act, 1996 being not there at that time, objections were filed under the old Act of 1940. This court remitted the award, vide order dated 10.4.1996, to the Arbitrators for reconsideration and giving reasons in support of the conclusions stated in the award after affording an opportunity of being heard to the parties. The Arbitrators submitted their decision in 2000. By then the Act of 1996 had come into force. Though the Arbitrators have labeled their decision as supplementary award, there is no provision either in the Arbitration Act of 1940 or in the Arbitration and Conciliation Act, 1996 for making of a supplementary award or a revised award etc. It may be stated that this court remitted the award to the Arbitrators, under Section 16 of the Arbitration Act 1940, which is reproduced for ready reference:-

> **"16. Power to remit award:-** (1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit,-
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> (a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or
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> (b) where the award is so indefinite as to be incapable of execution; or
>
> (c) where an objection to the legality of the award is apparent upon the face of it.
>
> (2) Where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court:
>
> Provided that any time so fixed may be extended by subsequent order of the Court.
>
> (3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed".

16. It is clear from a plain reading of sub-section (2) of Section 16, ibid that what an Arbitrator is required to do, after the remission of the award, is to submit his decision to the Court and not any supplementary or revised award. Sub-section (3) of Section 16, ibid makes the things further clear by providing that if the decision is not submitted within the time fixed by the Court, the award remitted under sub-section (1) shall become void. That means, the effect of an order of remission of an award is that the award remains intact, though it becomes contingent, the contingency being that the Arbitrator submits his decision within the time fixed by the Court in the order of remission and if the Arbitrator fails to submit his decision within the time fixed by the court, including the extended time, if any, the award

becomes void. The legal position that emerges from the reading of Section 16 may be summed up thus:-

(a) When an award is remitted to the Arbitrator, it is not set-aside;

(b) After the remission of the award, the Arbitrator is required to submit his decision to the Court, in terms of the order of remission within the time fixed by the Court for submission of such decision, including the time extended by the Court from time to time;

(c) If the decision is not submitted within the time fixed by the Court including the extended time, the award is rendered void.

17. Now if the remission of an award does not amount to its setting aside, what the Arbitrator has to do after the remission of the award is only to submit his decision in terms of the order of remission, under Section 16(2) of the Arbitration Act of 1940 and the effect of such decision is only to render contingent award an absolute award, which in the event of decision being not submitted within the time fixed by the Court will be rendered void. Therefore, it would be the date of the award and not the date of the decision which will be the determining factor for the question whether the award can be challenged under the Arbitration Act of 1940 or the Arbitration and Conciliation Act of 1996. In the present case, admittedly the date of the award is 1.6.1992. The Arbitration and Conciliation Act, 1996 came into force on 22.8.1996. Therefore, the validity of the award is challengeable under the Arbitration Act, 1940 and not under the Arbitration and Conciliation Act, 1996.

18. As a result of the above discussion, the petition for amendment of objection, i.e. OMP No. 398 of 2001 is dismissed.

19. Having disposed of the application for amendment of the objection petition (OMP No. 398 of 2001), I proceed to record my finding on the issues framed by this Court on 13.7.2000.

Issues No. 1 & 2.

20. Both these issues are co-related. Therefore, they are taken up together for discussion and determination.

21. Learned counsel for the defendant- objector took me through the decision of the Arbitrators and submitted that the reasons are not real but an apology for the same. He submitted that to justify the quantum of compensation awarded vide award dated 1.6.1992, what the Arbitrators have done is that certain sum of money has been assumed as the monthly overhead charges without any basis and similarly different periods in respect of different items of claims on account of delay have been assumed again without any basis to justify quantum of compensation awarded by them on account of alleged delay on the part of the objector- defendant in making the site available and supply of steel and cement. He submitted that for delay in handing over the site to justify the quantum of Rs. 12 lacs awarded vide award dated 1.6.1992, the period of delay has been assumed to be 50 days, while to justify the amount of Rs. 13 lacs awarded for alleged delay in supplying the cement and steel, the period has been assumed to be 54 days, without indicating as to how they have assumed or worked out such periods of alleged delays. He further submitted that for assumption of overhead charges at the rate of Rs. 7.3 lacs, per month also, the Arbitrators have not given any basis.

22. Arbitrators have stated that they have made the assessments of periods and the amount on the basis of their longstanding experience in the field of Civil Engineering. I see no reason for disbelieving the assessment done by the Arbitrators because both of them are admittedly Engineers with longstanding experience of Civil Engineering works. Further

one of the Arbitrators is a nominee of defendant while the other is a nominee of the plaintiff and both of them are unanimous about the said assessments.

23. Learned counsel further submitted that the reasons recorded by the Arbitrators for rejecting the plea of limitation raised by the defendant-objectors are contrary to the specific clauses of the arbitration agreement.

24. Learned counsel drew the attention of the court to the following portion of Clause 25 of the agreement, which provides for settlement of disputes by Arbitrator, to buttress his plea that the reasons recorded by the Arbitrators for holding the claims to be within time are contrary to the terms of the contract between the parties:-

> "It is also a term of the contract that if the contractor(s) does/ do not prefer any claim(s) in writing within 90 (ninety) days of the date on which the dispute first arises or date of intimation of the preparation of the bill therefor, whichever is earlier, the claim of the contractor will be deemed to have been waived and absolutely barred and the HPSEB shall be discharged and released of all the liabilities under the contract in respect of such claim(s)……"

25. According to the aforesaid clause, the claims would be time barred if not preferred within ninety days of the date on which the dispute first arose or the date of intimation of the preparation of the bill therefor, whichever is earlier. In the present case, the question of intimation of preparation of the bill does not arise because the claims in their entirety are refuted.

26. Now the question is whether the plaintiff had preferred the claims within ninety days of the date on which the dispute first arose. There is absolutely no material on the record to suggest as to when did the dispute regarding the claims arise between the parties. The plaintiff made claims for various items. The same remained pending with the defendant

up to 17.7.1989 on which date the defendant- objector rejected the same vide Annexure RE-16. Therefore, it can legitimately be presumed that the dispute arose when the claims of the plaintiff were rejected by the defendant- objector on 17.7.1989. The plaintiff invoked the arbitration clause on 2.8.1989, i.e. to say within the stipulated time per clause 25 of the agreement. Therefore, it cannot be said that the reasons assigned by the Arbitrators are perfunctory. Accordingly the issues are decided in favour of the plaintiff and against the defendant- objector.

Issue No. 3.

27. Learned counsel representing the defendant-objector submitted that claims in respect of all the four items for which award has been given by the Arbitrators in favour of the claimant are specifically barred by the contract between the parties.

28. The Arbitrators have awarded damages in respect of the following items of claim to the extent mentioned against each:-

Sr. No.	Description of the claim	Amount awarded.
Claim- A		
Item (i)	Delay in execution of contract on account of defendant's / objector's inability to handover a part of the site to the claimant.	= Rs. 12 lacs.
Item (ii)	Delay in supply of cement and steel.	= Rs. 13 lacs.
Claim- B.		
	Defendant's failure to provide approach road to the site.	= Rs. 9 lacs.
Claim- D.		
	Non availability of natural sand necessitating manufacture and crushing of sand by the claimant.	= Rs. 30 lacs.

29. Referring to award of Rs. 12 lacs on account of Item (i) of Claim-A above, learned counsel for the objector-defendant referred to the

following condition appearing in Chapter –VIII pertaining to additional conditions of contract, which is numbered as 8.3 (ii):-

> "(ii) Entry by the Board on the land handed over to the Contractor:-
>
> The Board, if deems fit, may enter any portion of the land handed over to the contractor under this contract, for the purpose of executing the other works (not included in this contract), if so proposed, by the Board, through its agencies or through other contractors, as the case may be and the contractor shall act in accordance with the directions of the Engineer-in-Charge. The contractor shall also afford all the reasonable facilities for the execution of such works (i.e. works not included in this contract) including the handing over of required land for structures to the other contractors or their workmen or the Board workers who may be employed in execution of such works. In case the exercise of these Board powers by the Board shall cause any damage to the contractor, he (contractor) may, as and when the damage shall occur, make a statement of the same to the Engineer-in-Charge, who (Engineer –in-Charge) shall examine the genuineness of such damage certify to the Board from time to time the value of such damage, based on actual assessment, and the Board will from time to time, pay the contractor, the amount so certified by the Engineer-in-Charge. The contractor shall not however, on account of any such work executed by or on behalf of the Board be entitled to claim any relief under this contract for obligations."

30. The Arbitrators have dealt with this item of claim in the following words at page 13 of their award dated 1.6.1992:-

> "The Contractor's contention that all the land required for the working area was not handed over to him by HPSEB is not correct. Only about 10% of the total Reservoir floor area near the Tunnel intake, which forms the last item in the sequence of construction was occupied by M/s. Gammon India Ltd., Contractors for the Tunnel work. The Contractor states that since the above area was handed over to them last, they

could not complete the Reservoir floor works. From the records produced by both the parties before the Arbitrators, it was not very clear as to what extent the construction was delayed due to handing over the site last. At best, the Contractor might have rescheduled his construction activity to suit site conditions causing some minor delay. Accordingly, the Arbitrators hereby award Rs. 12.00 lacs (Twelve lacs) as claim to the Contractor."

31. Reasons supplied by them in their decision dated 10th January, 2000, pursuant to the order of remission, read as follows:-

"After hearing the matter in detail in the presence of both the parties i.e. the Claimants and the respondents during arbitration proceedings and also subsequently there could not be found any common ground for settling the delay due to hold up of the reservoir floor area by M/s Gammon India Ltd. However, after due assessment as Engineers with long standing experience of civil engineering jobs it was assessed by the Arbitrators that the delay was of about 50 days (non overlapping) which could be reasonably attributed to the time lost and delays caused due to the areas not being released by M/s Gammon India Ltd. on account of the work of tunnel being done by M/s Gammon India Ltd., in CCL's area of work.

We assessed that an amount of Rs. 7.31 lakhs as reasonable overhead charges for every month of delay.

Therefore, the award to CCL as compensation would be:-

$\frac{7.31 \times 50 \text{ days}}{30}$ =Rs. 12,18,333.00 Say Rs. 12 lakhs."

32. A reading of the above reproduced portion of the original award of 1.6.1992 shows that as a matter of fact 10% area of the site remained in occupation of M/s Gammon India Ltd. This portion of the site was required by the plaintiff- claimant for reservoir floor area, which was the last item to be constructed by it under the contract.

33. Condition 8.3.(ii) has no application to this fact situation. Its bare reading suggests that it binds the claimant- plaintiff to allow the defendant- objector or other contractors engaged by the defendant-objector to operate simultaneously on the site handed over to the claimant-plaintiff. The question of its application does not arise where a portion of the site was not handed over to the claimant- plaintiff but remained in occupation of the Board or some other contractor engaged by the Board and because of which the machinery deployed and the work force engaged by the plaintiff- claimant remained idle for quite some time causing monetary loss to the plaintiff- claimant.

34. For the foregoing reasons, the compensation awarded by the Arbitrators for item (i) of Claim-A, as described hereinabove, cannot be said to be contrary to the express provisions of contract.

35. To substantiate his plea regarding item (ii) of Claim-A, learned counsel for the defendant- objector has referred to Clause-10 of the agreement, which pertains to supply of material to be used in execution of works allotted to the plaintiff- claimant. The clause provides how the value of the material is to be adjusted and how the un-used surplus material is to be accounted for. The relevant portion of the clause upon which reliance has been placed by the learned counsel for the defendant –objector, reads as follows:-

> "……Provided that the contractor shall in no case be entitled to any compensation or damages on account of any delay in supply or non supply thereof of all or any such materials and stores."

36. The above reproduced portion of Clause-10 of the contract leaves no doubt that in the case of delay in supply or even non-supply of the material, the parties agreed that the contractor shall not be entitled to any compensation or damages.

37. A Division Bench of this Court in **M/s Hydel Construction Ltd.** vs. **H.P. State Electricity Board** [1999 (3) Shim. L.C. 10], vide para 68 has held that where a clause in the contract or technical conditions annexed thereto specifically prohibits the making of any extra payment for any item, this would not be a case of interpretation of a clause of contract and that if despite this prohibition the Arbitrator awards compensation by way of extra payment despite such prohibition that would be a case of an error apparent on the face of the record, vitiating the decision of the Arbitrator with respect to that particular item of claim. On the analogy of this judgement, it can be said that where the parties agree in no uncertain terms that for any particular lapse or failure on the part of one party, the other would not be entitled to any claim or damages, that would not be a question of interpretation of a clause of contract and if the Arbitrator despite such a stipulation in the agreement awards compensation for such a lapse, the award to that extent would be liable to be set aside on account of an error apparent on the face of it. Consequently it is held that the award of the arbitrators in so far as it pertains to Item (ii) of Claim-A is vitiated by an error apparent on the face of it and is liable to be set aside.

38. Dwelling on Claim –B regarding defendant's failure to provide approach road to the site, for which a sum of Rs. 9 lacs has been awarded as damages, learned counsel for the objector- defendant drew the attention of the court to condition No. 8.2 in Chapter VIII of additional condition of contract which reads thus:-

> "The following approach roads will be constructed and maintained by the Board in accordance with the standards laid down by the Engineer-in-Charge.
>
> 1. To the weir site and tunnel Inlet.
> 2. To the Surge Shaft and Tunnel Outlet.
> 3. To the adit of pressure shaft.
> 4. To power house access tunnel.

> While efforts will be made to keep the above roads open through out the year, the Board shall not be responsible for any damage or loss suffered by the contractor due to closure of the road or roads on account of land slides, weather conditions or any other reasons whatever. The contractor shall at his own cost and with the approval of the Engineer-in-Charge construct and maintain any additional approach roads, access roads at the sites as he may consider necessary. The contractor shall allow free use of these roads by the Board. "

39. Learned counsel submitted that the bridge that had been constructed by the plaintiff- claimant was part of an internal access road constructed by it at the site and such a road was required to be constructed by it at its own cost, per above reproduced additional condition No. 8.2. Counsel for the plaintiff controverted the submission and contended that the bridge was laid on an approach road which was required to be provided by the objector- defendant Board under the terms of the contract. The Arbitrators while dealing with this item of claim in the award dated 1.6.1992, observed as follows:-

> "The Contractor has argued that approach roads were to be provided by HPSEB for the whole work area, which includes the works situated on the left bank of the river. However, HPSEB has argued that as per the Contract Agreement, the approach is to be provided only up to Tunnel inlet. As the Contractor has actually constructed the steel bridges on the river and also he has not claimed for the road between the Tunnel-inlet to the bridge site, the Arbitrators hereby allow the cost of the Bridges at Rs. 9.00 lacs (Nine lacs only) to be paid to the Contractor."

40. Reasons given by the Arbitrators in support of the award dated 1.6.1992, vide their decision dated 10th January, 2000, are as follows:-

> "The contract does specify that roads are to be constructed and maintained by the respondents. This includes the approach road to the weir site also as specified in clause 8.2 in respect of Approach Roads of the Contract. The weir site required approach roads on both the river banks, otherwise the weir site could not be fully approached. Even as per following definition of the `work site' which is to be read in conjunction with aforesaid clause 8.2 of the contract,
>
> > `The site shall mean the land and/or other places on, into or through which work is to be executed under the contract or any adjacent land, path or through which work is to be executed under the contract or any…… the contract'.
>
> The gap ought to have been completed (bridged) by the respondents.
>
> This gap has been bridged by the Claimants, who constructed steel bridges to get an approach to both sides of the weir i.e. on the other bank also. Further, not only the drawings of the bridge were approved by the respondents, but also they had accepted and thus admitted vide their letter dated 30.12.85 (Appendix 2 B, page 67 of Statement of claim) that the bridges in question formed an integral part of the approach. The respondents thus failed to provide to the Claimants through approach road to the site in accordance with the contract stipulations and the Claimants provided two bridges to make approach complete for giving communication across the river."

41. From what the Arbitrators have recorded in the award dated 1.6.1992, as reproduced hereinabove and the reasons given by them in the decision dated 10th January, 2000, which too have been reproduced hereinabove, it is clear that the bridges had been constructed by the plaintiff- claimant to cover the gap between the approach roads constructed by the objector- defendant on two sides of the river and that the covering of this gap by bridges was part of providing effective approach to the site of work. Therefore, in the light of the above reasons and the observations of

the Arbitrators, the contention of the objector- defendant that the bridges were provided to connect the internal roads of the site cannot be accepted. In other words, the award pertaining to Claim-B calls for no interference.

42. Arbitrators have awarded Rs. 30 lacs to the claimant- plaintiff to compensate it for the sand which it had to crush on account of non-availability of natural sand. In the award dated 1.6.1992 they have dealt with this item of claim as follows:-

> "HPSEB has submitted that as per contract Agreement, the Contractor was cautioned before tendering that sufficient quantity of sand was not available at the quarry sites indicated in the documents and therefore sand may have to be manufactured and no extra payment would be made. The Contractor has submitted that no sand was available from the areas indicated in the documents, as the river frequently changed its course, thus making it almost impossible to extract sand; therefore, they had to manufacture sand for the entire quantity for which they had incurred additional expenditure. The Contractor argued that HPSEB had also realized this and had intimated Govt. of India accordingly, while forwarding the case for the import of rods for the Rod-mill for manufacturing sand. The Contractor argued that they were not expecting that entire quantity of sand had to be manufactured and that no quantity would be available at site. Hence their claim is genuine.
>
> The Arbitrators have inspected the site and it was seen that some quantity of sand could have been quarried, though the entire quantity could not be taken out. Since the Contractor had not quarried adequate quantity of available sand from the river bed, his request for higher rate for the entire quantity cannot be accepted. However, in equity, he is being allowed the claim to the extent of Rs. 30.00 lacs (Thirty lacs only)."

43. Reasons recorded by the Arbitrators in their decision dated 10th January, 2000 with regard to this item of claim, are as follows:-

> "It is an admitted fact that sand was not available in required quantities. It is also an admitted fact that the claimant incurred extra expenditure for manufacture of sand to

supplement the quantity. Also, sand is one of the important ingredients for civil works and without sand, the contractor could not complete the work.

The Arbitrators having inspected the site and having examined all the related matters, both technical and otherwise with both the parties at site and on the basis of records, have come to the conclusion that sand was not available in required quantities and that the claimant incurred extra expenditure for manufacture of sand to supplement the quantity. Based on our experience in civil Engineering works, it is assessed that around 55% to 57% i.e. 56% (AV) quantity of sand could have been quarried.

The quantity of sand that could not be arranged: 44% (App) (i.e. 100% - 56%). Hence the claimant is considered entitled to an amount of Rs. 68,74,299.60 x 0.44 = Rs. 30,24,691.18 Say Rs. 30 lakhs. Accordingly, the respondent shall pay an amount of Rs. 30 lakhs plus interest thereon to the claimant against Part `D'."

44. Learned counsel for the objector- defendant drew the attention of the court to a foot note on the drawing pertaining to tentative site for natural sand, graval and boulders, which is part of the agreement and also to relevant portion of Clause 1.09 of Chapter-I pertaining to material for construction. Foot note below the drawing reads as follows:

"Adequate quantities of suitable sand/ aggregate/ boulders may not be available from these sites and the contractor may have to resort to manufacturing of sand/ aggregate or transport these materials from other distant sites."

45. Relevant portion of Clause 1.09 of Chapter-I, referred to above, reads as follows:-

"<u>MANUFACTURED SAND</u>

Whenever natural sand conforming to specification requirement is not likely to be available within economical reach, recourse has to be taken to manufacture stone sand of

> desired quality. The contractor shall comply with the direction of the Engineer-in-Charge in this behalf. No extra payment shall be made for use of manufactured sand for such change over."

46. The effect of similar note on the drawing and similar condition regarding material for construction was considered by a Division Bench of this Court in **M/s Hydel Construction Ltd.** vs. **H.P. State Electricity Board** (supra), because in that case also one of the items of claim was compensation for the manufacture of sand by crushing stones. The Hon'ble Division Bench observed as follows vide para-69:-

> "This is not a case of interpretation of a Clause of Contract Agreement or technical conditions annexed thereto but a case in which the Arbitrators have read something in para 1.09 of Technical Conditions which is specifically prohibited. Had the sentence `No extra payment shall be made for use of manufactured sand for such change over' not been there, the Arbitrators would have been right in allowing this claim. Therefore, it is a case of an error apparent on the face of the record vitiating the decisions of the Arbitrators in respect of Claim No. 3 as they have gone beyond para 1.09 of Technical Conditions. Therefore, we have no hesitation to uphold the findings of the learned Single Judge whereby he has set aside the award of the Arbitrators against Claim No. 3 by accepting the Objections of the Board."

47. The aforesaid precedent applies to the facts of the present case on all fours. Consequently, it is held that the award of compensation to the tune of Rs. 30 lacs by the Arbitrators on this count is vitiated by an error apparent on the face of it and hence liable to be set-aside.

48. To sum up, the award of the Arbitrators only with respect to two items, i.e. Claim –A (i) and Claim –B is in consonance with the terms of the agreement that was executed between the parties. The award with respect to remaining two items, i.e. Claim-A (ii) and Claim –D is liable to be

set-aside. The total amount of the two claims, which have been held to be in consonance with the agreement between the parties, comes to Rs. 21 lacs (Rs. 12 lacs + Rs. 9 lacs).

49. Reasons recorded by the Arbitrators for rejection of objector's counter claims were not assailed specifically during the course of hearing. So the award to this extent also brooks no interference.

50. Issue has been answered accordingly.

Issue No. 4.

51. In view of the finding on issue No. 2, it is held that the award of the Arbitrators with regard to Items Claim- A (ii) and Claim- D is beyond their jurisdiction.

Relief.

52. In view of the above findings, the award of the Arbitrators with respect to Claim – A (ii), i.e. delay in supply of steel and cement and Claim –D, i.e. compensation for manufacture of sand by crushing stones, is set-aside. The award with regard to the remaining items of claim is made rule of the court. Decree sheet be drawn accordingly.

(Surjit Singh)
Judge

September 19, 2006.
(BC/ Hem)